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IN THE

Supreme Court of the United States

October Term, 1964

No. 280

IRVING A. KANAREK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

To the Honorable Chief Justice Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in the above-entiled case on March 6, 1963; a timely Petition for Rehearing, filed April 5, 1963, was denied on April 17, 1964.

Citation to Opinion Below.

The judgment of the aforementioned United States Court of Claims was entered on March 6, 1963; concurrently with the entry of judgment said Court of Claims filed a written opinion which is the only one in this case. Said opinion is reported at 314 Fed. 2d 802. The certified record which accompanies this Petition for a Writ of Certiorari includes said opinion [R. 146-151]. (See Appendix A, pp. 1-8).

Jurisdiction.

As stated, *supra*, the Court of Claims judgment was entered, with written opinion, on March 6, 1963, and timely Petition for Rehearing was filed on April 5, 1963; on April 17, 1964, the Petition for Rehearing was denied without written opinion, by said Court of Claims. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

Questions Presented.

A. Whether the United States Court of Claims has power to invoke the provisions of "The Industrial Personnel Security Review Regulation" (Department of Defense Directive 5220.6) termed Program "B" for the sake of convenience in this Petition for a Writ of Certiorari (set forth in 20 Federal Register 1554), and its antecedent "The Industrial Personnel and Facilities Security Clearance Program," termed Program "A" for the sake of convenience in this Petition for a Writ of Certiorari, to evaluate the measure of monetary recovery of petitioner whose security clearance while employed at North American Aviation, Inc., was withdrawn without authority by the United States, with the consequent pinning on him of a lifetime "BADGE OF INFAMY",* in view of the fact that this Court holds in *Green v. McElroy*, 360 U. S. 474 at page 504, that Program "A" and Program "B" constitute an "elaborate clearance program" which was unauthorized. Included in this question is whether there was, in fact,

*Language used by this Court in *Wieman v. Updegraff*, 344 U. S. 183 at 191 (involving a State Civil Service employee) and *Peters v. Hobby*, 349 U. S. 331 at 347 (involving a professor of medicine employed as a Special Consultant by the Federal Government).

any administrative remedy whatsoever available to petitioner [See *Public Utilities Commission v. United States*, 355 U. S. 534 at 539 and R. 121].

B. Whether 28 U. S. C. 1491 provides a basis or bases for monetary recovery by petitioner due to the unauthorized withdrawal of petitioner's security clearance by the United States. Included in this question is whether the due process clause of the Fifth Amendment constitutes a basis for recovery and/or whether the just compensation clause of said Fifth Amendment constitutes a basis for recovery.

C. What are the criteria which must be used to evaluate the extent of petitioner's monetary recovery for the damage resulting to him from the unauthorized withdrawal of security clearance by the United States?

Constitutional Provisions, Statute and Regulations Involved (See Appendix B).

A. The Constitutional provisions involved are the due process and just compensation clauses of the Fifth Amendment.

B. The Statute involved is 28 U. S. C. 1491.

C. The regulations involved are

1. Industrial Personnel and Security Clearance Program [R. 42-60], held unauthorized in *Greene v. McElroy*, 360 U. S. 474.

2. Industrial Personnel Security Review Regulations, Department of Defense Directive No. 5220.6, held unauthorized in *Greene v. McElroy*, 360 U. S. 474. [Ex. 2 attached to "Defendant's Reply to Plaintiff's Objections to Defendant's Motion to Dismiss" and referred to at R. 68].

(In this Petition for a Writ of Certiorari 1, *supra*, is termed program "A", and 2, *supra*, is termed Program "B"; the purported Monetary Restitution provisions of these two programs are set forth in Appendix B).

Statement.

On April 1, 1958, petitioner filed a timely Petition with the United States Court of Claims [R. 1-6]. This Petition has a Court of Claims Docket Number 139-58. The jurisdiction of the Court of Claims was invoked because the security clearance of petitioner was revoked by the purported authority of Program "A", a regulation promulgated by the Secretaries of the Army, Navy and Airforce on May 4, 1953 [R. 42-60].

Prior to and including July 12, 1954, petitioner was employed at Los Angeles, California by North American Aviation, Inc., hereinafter referred to for convenience as North American, as a Research Engineer. Prior to and including July 12, 1954, petitioner was possessed of a security clearance authorizing petitioner to have access to classified security information up to and including material and information classified as Top Secret.

On or about July 12, 1954, petitioner and North American were informed by the Screening Division of the Western Industrial Personnel Security Board, purportedly an agency of the Department of Defense of the United States Government, that the granting of clearance to petitioner of access to classified security information was not clearly consistent with the interests of national security. Petitioner was suspended without pay on or about July 12, 1954 by North American as a result of said action of said Screening Division. Petitioner's salary at the time of said suspension was $710.00 per month.

After a hearing before the Appeal Division of the Western Industrial Personnel Security Board, petitioner and North American were informed on or about September 29, 1954, that granting petitioner access to classified information was not clearly consistent with the interests of national security.

On or about September 6, 1955 the Industrial Personnel Security Review Board determined that the granting to petitioner of clearance for access to classified information was clearly consistent with the interests of national security. This Board was purportedly operating under Department of Defense Directive No. 5220.6 (termed Program "B" herein), [Referred to as Ex. 2 at R. 68], the effective date of which was April 3, 1955. The aforementioned Directive purportedly superseded the Industrial Personnel and Facility Security Program (termed Program "A" herein). Both of these Programs were found to be unauthorized by this Court in *Greene v. McElroy, supra.* Notwithstanding the determination of the Industrial Personnel Security Review Board (on or about September 6, 1955), that the granting to petitioner of clearance for access to classified information was clearly consistent with the interests of national security, petitioner was not regranted access to information classified as Secret until on or about February 7, 1958 while employed at Radioplane Co.

Due to the fact of the withdrawal of security clearance petitioner was completely deprived of employment utilizing his technical skills from July 12, 1954 to April 9, 1956. During the period September 21, 1955 to April 9, 1956 petitioner had no earnings.

During the period April 9, 1956 to January 21, 1956 Petitioner was employed at Lockheed Aircraft Corp., Missile Systems Division, but notwithstanding the action of the Industrial Personnel Security Review Board of on or about September 6, 1955, and the letter of September 15, 1955 sent to the Headquarters Air Materiel Command [R. 127], the United States did not re-grant petitioner Secret clearance while he, petitioner, was employed at Lockheed.

Due to the fact of withdrawal of security clearance on or about July 12, 1954 and the fact that petitioner was not successful in obtaining re-grant of security clearance to the Secret level (at North American petitioner had a Top Secret security clearance) until on or about February 7, 1958, petitioner has been extensively and permanently damaged due to withdrawal of his security clearance. Due to the fact of withdrawal of security clearance on or about July 12, 1954 and the fact that petitioner was not successful in getting the re-grant of security clearance to the Secret level until on or about February 7, 1958, petitioner has lost forever irreplaceable experience-time in the field of rocket propulsion research in which field he had been engaged. The withdrawal of security clearance disloged petitioner from the field of rocket propulsion research and the entire field of rocket propulsion, research and otherwise, with consequent extensive and permanent damage to him.

Petitioner is co-inventor of a patent (No. 2,760,845) entitled "Stabilized Fuming Nitric Acid," a material now extensively used as a propellant (oxidizer) by the United States Government in jet propulsion driven vehicles, such as vehicles driven by certain rocket engines.

This invention also has non-jet propulsion uses. Petitioner is inventor of a patent (No. 2,930,684) entitled "Propellant Combination Including Liquid Fluorine and Liquid Oxide Oxidizer." Since these inventions occurred during the course of research work while petitioner was at North American, petitioner's interests in said patents were assigned to North American. Nevertheless, North American has had a policy of making certain monetary awards to each inventor in connection with each of his inventions provided the inventor is on the payroll at the time of the issuance of the patent. The "Stabilized Fuming Nitric Acid" patent referred to, *supra*, was issued on August 28, 1956; the "Propellant Combination Including Liquid Fluorine and Liquid Oxide Oxidizer" patent referred to, *supra*, was issued on March 29, 1960. Other patent disclosures both classified and unclassified, were made to North American by petitioner. At least two of said disclosures have resulted in the issuance of Secrecy Orders by the United States Patent Office. (Said Secrecy Orders are themselves not classified. They are transmitted by ordinary mail and are not labeled as classified matter. No patent can issue from a disclosure covered by a Secrecy Order, regardless of the patentability of the subject matter, until the Secrecy Order is lifted.)

The fact of withdrawal of security clearance imposed, and still imposes, a "badge of infamy" upon petitioner. By way of illustration, reference is made to a paper which was presented to the American Rocket Society at its fall meeting, September 18-21, 1955, at Los Angeles, California, by North American personnel. This paper, entitled "Generalized Solution of the Theoretical Specific Thrust of a Rocket Motor for the C-H-N-O-F

Atomic System," did not include petitioner as a co-author because of the fact of the withdrawal of his security clearance.

Due to the fact of withdrawal of security clearance on or about July 12, 1954, employment, professional, and other opportunities for petitioner have been permanently and extensively damaged and limited. Petitioner did not obtain re-grant of security clearance to the Secret level until on or about February 7, 1958. Petitioner's employment and professional opportunities in space age industries and organizations, including, but not limited to, the National Aeronautics and Space Administration, the Jet Propulsion Laboratory, Convair, a Division of General Dynamics Corporation, the Ramo-Wooldridge Corporation and its affiliates, and the Douglas Aircraft Company, Inc., have been permanently and extensively damaged. Due to the fact of the withdrawal of security clearance petitioner has lost forever the capacity to reach levels of financial recompense in both scientific and non-scientific activity consistent with his unique and highly specialized training, abilities, and experience, whether said activity requires security clearance or not.

Petitioner alleges that he has been damaged in the sum of at least $163,831.00.

On August 1, 1958, the defendant made a Motion to Dismiss Plaintiff's Petition [R. 1-6] for the alleged reason that it failed to state a claim upon which review can be granted. On November 19, 1958, in response to this Motion to Dismiss, petitioner filed a brief entitled "Plaintiff's Objections to Defendant's Motion to Dismiss." [R. 11-60]. (On December 3, 1958, petitioner filed certain corrections involving clerical errors

[R. 61-62] to "Plaintiff's Objections to Defendant's Motion to Dismiss".) On October 14, 1959, defendant filed "Defendant's Reply to Plaintiff's Objections to Defendant's Motion to Dismiss" [R. 63-94].

On May 12, 1961, petitioner filed "Plaintiff's Response Brief to Defendant's Reply to Plaintiff's Objections to Defendant's Motion to Dismiss" [R. 95-122].

On June 5, 1961, defendant filed "Defendant's Supplemental Documents and Citations" [R. 123-128].

On June 5, 1961, petitioner moved to have the Petition deemed amended by the incorporation of certain matter already before the Court and said Motion was allowed on June 19, 1961 [R. 129-131].

On June 30, 1961, after oral argument before the Court by the parties, the Court suspended further proceedings pending petitioner's "pursuit and completion of the administrative remedy available through the Department of the Airforce," which remedy petitioner contended, and now contends, is, in fact, no remedy at all and unauthorized (see Sec. VII, p. 23 *et seq.* of "Plaintiff's Response Brief to Defendant's Reply to Plaintiff's Objections to Defendant's Motion to Dismiss" [R. 118-122], wherein it is pointed out that there was not any administrative remedy to exhaust since, *inter alia*, Program "A" and Program "B," *supra*, were unauthorized.)

On December 7, 1962, defendant filed "Defendant's Supplemental Brief and Exhibits Following Administrative Action" [R. 133-139], where defendant purportedly determined that $4,677.52 was the maximum that petitioner can recover. Petitioner filed "Plaintiff's Response to Defendant's Supplemental Brief and Exhibits

Following Administrative Action" [R. 140-142] on February 4, 1963, and the affidavit of petitioner [R. 143-145] on February 5, 1963, which affidavit reiterates the fact that Secret clearance was not restored until February 7, 1958 [R. 145]. It was *NOT* restored on September 21, 1955, as set forth in the Court of Claims' judgment and opinion [R. 147]. The Top Secret level of clearance was never restored [R. 145].

On April 5, 1963, petitioner filed a timely request for a rehearing by way of "Motion for Rehearing, Motion for Alteration of Judgment, Motion for Amendment of Judgment, and Motion for New Trial" [R. 152-159] which was opposed by "Defendant's Response to Plaintiff's Motion for Rehearing, Motion for Alteration of Judgment, Motion for Assignment *(sic)*, and Motion for New Trial" [R. 160]. Petitioner's request for a rehearing was denied on April 17, 1964 [R. 161-162], more than one year after the timely request was filed.

Reasons for Granting the Writ.

The present paucity of judicial authority on the important question of the liability of the United States to the employee of a contractor of the United States, where said employee's security clearance has been withdrawn without authorization, warrants review by this Court of the instant case to determine the extent of the obligation of the United States under the Fifth Amendment and or under 28 U. S. C. 1491 to Petitioner in view of the fact that said petitioner's security clearance was withdrawn without authorization. (About eight years ago there were 3,000,000 employees and 22,000 private contractors involved in employee-contractor se-

curity programs [R. 18]; today there are probably both more employees and private contractors.) Said security clearance was held by petitioner at a time when he was an employee of North American Aviation, Inc., a contractor of the United States. This question has not been decided by this Court. In *Dooley v. The United States*, 182 U.S. 222 at 224, this Court, in referring to an earlier version of what is now 28 U.S.C. 1491, stated that the statute contemplated "distinct classes of cases," and near the bottom of page 228 in Dooley this Court clearly sets forth that even if a particular case appears to be ruled out under one section of the statute, it may still fall within another section.

1. The instant case presents the question of what criteria shall be used in determining the measure of recovery of an employee of a contractor of the United States when said employee has his security clearance withdrawn without authorization by law; petitioner contends that the Fifth Amendment, by way of the due process and just compensation clauses, and 28 U.S.C. 1491, provide several independent bases for the obligation of the United States to pay for damages resulting from the unauthorized withdrawal of security clearance of a contractor employee. This Court has not decided what criteria shall be used as a measure of damages for the unauthorized withdrawal of security clearance, nor has this Court decided what legal basis or bases shall be used to impose upon the United States the obligation to pay for unauthorized withdrawal of security clearance of a contractor employee. It is respectfully suggested that this Court should review the decision of the Court of Claims in view of the fact that notwithstanding this Court's decision in *Greene v. McElroy*, 360

U. S. 474, that the purported security programs used to withdraw security clearance of petitioner were unauauthorized, the Court of Claims, nevertheless, purportedly used the monetary restitution provisions of those security programs in determining the extent of payment to be made to petitioner. Petitioner claims at least $163,381 should be paid to him whereas the Court of Claims has authorized payment of $4,677.52 plus the possibility of a maximum additional amount of only $5,580.48 [R. 151, including footnote, and R. 3, Item 13 in the original Petition before the Court of Claims]. This Court will grant certiorari following a judgment by the Court of Claims granting to a plaintiff the right to recover even though said Courts of Claims has reserved for further proceedings its determination as to the exact amount of damages. *Caltex, Inc. v. United States,* 100 Fed. Supp. 970 at 980, reversed, 344 U. S. 149. Furthermore, this Court has acted where there is some important and clear cut issue of law that is fundamental to the further conduct of the case and that would otherwise quality as a basis for certiorari, despite the interlocutory status which the case may have in the Court below. *United States v. General Motors Corporation,* 323 U. S. 373 at 377; *Land v. Dollar,* 330 U. S. 731 at 734, note 2; *Larson v. Domestic and Foreign Commerce Corporation,* 337 U. S. 682 at 684, note 3. In the instant case there are such fundamental issues: (1) What is or are the legal basis or bases for recovery? (2) Whether the Court of Claims had the power to invoke the monetary restitution provisions of security programs which this Court has found to be unauthorized, *Greene v. McElroy, supra,* and (3) whether there is, in fact, an administrative remedy in

view of the procedure available, or rather lack of it. The Court of Claims has stated in its opinion [R. 146] that the determination and opinion of March 6, 1963, constitutes a determination of the petitioner's entire claim. Despite *Greene v. McElroy, supra*, and the fact that, in fact, there was no administrative remedy available through the Department of the Airforce [R. 118-122], the Court found an administrative remedy to exist [R. 146]. It is noteworthy in this regard that nowhere in the Court of Claims decision and judgment [R. 146-151] is there any discussion or analysis of the principles of *Greene v. McElroy, supra*, nor for that matter any mention of the case whatsoever.

2. In the decision it is stated [R. 147] that petitioner's security clearance was restored on September 21, 1955. This is not the fact. During the first part of September, 1955, the Industrial Personnel Security Review Board determined that the granting of clearance to petitioner "for access to classified information is clearly consistent with the interests of national security" [R. 126]. Although the Commander, Headquarters Air Materiel Command, Wright Patterson AFB, Ohio, was allegedly instructed to issue clearance for access to classified information to petitioner by way of letter dated September 15, 1955, clearance did not result therefrom; but, rather, it was not until on or about February 7, 1958, that petitioner was able to obtain a re-grant of security clearance to the Secret level [R. 2, Item 9].

3. The Court below laid great stress in its decision on *Dupree v. United States*, 141 Fed. Supp. 773, 136 Court of Claims 57 [R. 148-149]. In *Dupree*, however, the regulations under which Dupree was denied

security clearance were promulgated with express statutory and executive authority, 136 Court of Claims 57 at 58. This Court, as set forth, *supra*, by way of *Greene v. McElroy*, found the security programs which were applied to petitioner to be without authorization. This Court should grant certiorari in the instant case in view of the fact that without such grant there is no appellate review possible of the Court of Claims decision in the instant case, and the law, and novel premise, would be settled, without judicial review, that unauthorized regulations can purportedly be used to determine the criteria for recovery [Bottom of R. 149 to top of R. 150, and note 2 at the bottom of R. 68; also, see Appendix A, p. 6]; such procedure offends due process under the Fifth Amendment as did the unauthorized withdrawal of security clearance; notwithstanding the statements in *Dupree* [R. 148 and Appendix A, pp. 3-4], petitioner contends that the right to follow a lawful calling is Constitutionally protected and hence his claim is one founded upon the Constitution. This is borne out by *Parker v. Lester*, 227 F. 2d 708 at 717 where the Court states, referring to privately employed merchant seamen, that the liberty to follow their chosen employment

> "is no doubt a right more clearly entitled to Constutional protection than the right of a Government employee to obtain or retain his job."

Thus, there is a fundamental conflict between the Court of Appeals for the Ninth Circuit and the Court of Claims; furthermore, it is urged that the position of the Court of Claims is inconsistent with that of this Court in *Wieman v. Updegraff*, 344 U. S. 183, and *Peters v. Hobby*, 349 U. S. 331 (see footnote at bottom

of p. 2, *supra*), in that, as stated by Mr. Justice Douglas in his concurring opinion in *Peters v. Hobby*, *supra*, at 351.

> "We deal here with the reputation of men and their right to work—things more precious than property itself."

The Court of Claims in its decision in the instant case, quoting from its own decision in *Dupree*, *supra* (Appendix A, p. 4) asks the question.

> "did plaintiff lose his means of livelihood because of the alleged violation of his constitutional rights?"

In the case of petitioner the answer must be "yes" since, except for the violation of due process by way of the unauthorized withdrawal of the security clearance vested in him, petitioner would not have been severed from North American and dislodged from the rocket-propulsion field.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING A. KANAREK,
Counsel for Petitioner.

APPENDIX "A".

Opinion of the United States Court of Claims.

In the United States Court of Claims.

No. 139-58

(Decided March 6, 1963)

Irving A. Kanarek v. The United States.

Rex M. Minter for plaintiff.

Lawrence S. Smith, with whom was *Acting Assistant Attorney General Joseph D. Guilfoyle*, for defendant.

Before Jones, *Chief Judge;* Whitaker, *Judge;* Laramore, *Judge;* Durfee, *Judge;* and Davis, *Judge.*

On Defendant's Motion to Dismiss Plaintiff's Petition

Laramore, *Judge*, delivered the opinion of the court:

This case originally came before the court on defendant's motion to dismiss. The court, at that time, suspended the proceedings until plaintiff had exhausted his administrative remedy through the Department of the Air Force.

Plaintiff thereafter pursued said remedy, and the Secretary of the Air Force approved the claim in the amount of $4,677.52.

On July 23, 1962, plaintiff moved that the suspension of proceedings be lifted and that the court set the matter down for argument. This motion was premised on the contention that more money is due plaintiff, and the administrative recommendation of $4,677.52 was unacceptable to him. By order of court, this motion was allowed and, after filing of certain addi-

tional exihibits by defendant,[1] the case was assigned for argument on the validity of plaintiff's claim.

Thus the case now before us calls for a determination of the entire claim of plaintiff as alleged in his petition.

It is plaintiff's claim that in addition to loss of wages during the period his security clearance was withdrawn, he is entitled to a much greater sum representing damages suffered because of lost merit raises and general increases, damages based on a linear increase in earning power, loss of experience in the field of rocket propulsion research, loss of a bonus resulting from an invention of plaintiff, damages because of certain patent disclosures by North American Aviation, Inc., and for damages occasioned by loss of employment opportunities.

Plaintiff alleges his action arises under Article II of the Constitution of the United States, the Fifth Amendment thereto, and section 1491, Title 28 U.S.C., the general jurisdictional act relating to the Court of Claims.

The facts are these: On July 12, 1954, while employed as a research engineer for North American Aviation, Inc., plaintiff's Government clearance for access to classified security information was withdrawn. On September 21, 1955 it was restored.

North American Aviation, Inc., was a Government contractor and had, on April 6, 1953, entered into a written security agreement with the Government, containing various provisions for the safeguarding of

[1]Inasmuch as the defendant filed exhibits to support its motion to dismiss, we now treat the Government's motion as a motion for summary judgment. Rule 16(b) of the Rules of this court.

classified security data that would come into its possession in the course of its performance of Government contracts. One of these provisions was that the Government agreed, upon application of the contractor, to designate employees of the contractor who could have access to certain types of classified security information.

With the exception of plaintiff's claim for loss of wages, we are of the opinion that plaintiff's claims are unfounded, and we will dispose of such claims at the outset.

Plaintiff first contends that his claim has an independent contractual basis in that he is a third party beneficiary of the security agreement the Government had with North American Aviation, Inc. In this respect, plaintiff cites no legal authority, and we know of none favoring plaintiff. On its face, the agreement between the Government and the contractor was designed to protect the interests of the United States and not an employee of the contractor as plaintiff argues. Furthermore, it is apparent that there was no privity between plaintiff and the Government, and since his alleged injuries were the result of dealings between the United States and the contractor, there is no basis for a contract implied or in fact between plaintiff and the United States.

Nor can plaintiff base a claim upon the due process clause of the Constitution. It was so held by this court in *Dupree v. United States*, 136 Ct. Cl. 57. In this case the court stated, at page 61:

> We are, nevertheless, of opinion that his petition is insufficient to state a case as one founded on the Constitution. If it is possible at all in a

case such as this to state a case founded on the Constitution, it would, at least, be necessary to allege facts to show that, except for this violation of his constitutional rights, the certificate would have been granted him, and he would have been permitted to follow his vocation and would have earned the wages for which he sues.

It is hardly conceivable that such a case could be stated, and, even if it could be done, we seriously doubt the right of a citizen to recover a money judgment in such a case. But, assuming such a case could be stated; the question is, did plaintiff lose his means of livelihood because of the alleged violation of his constitutional rights? Otherwise stated, is it necessarily true that the certificate would have been issued to him if his alleged constitutional rights had been respected, that is, had he been confronted by his accusers.

How can we know? Suppose he had been confronted by his accusers and they had testified to the things alleged * * *; and that after these witnesses had been subjected to cross-examination, the Commandant had still believed their testimony, under these circumstances must he have granted the certificate? If this does not follow, plaintiff has not stated a case. Plainly it does not follow.

The *Dupree* case and this case are strikingly similar. Dupree's security clearance was withheld; plaintiff's security clearance was withheld. Here, as in the *Dupree* case, nothing is present, alleged or proved, to convince us that under any circumstances plaintiff's certificate would not have been removed or would have been

granted him so that he would have been permitted to follow his vocation. Having failed to allege and prove the necessary allegations under the criteria of the *Dupree* case, *supra*, plaintiff cannot recover under the due process clause of the Constitution.

Nor has plaintiff stated a case under the just compensation clause of the Fifth Amendment of the Constitution. The action taken was simply the issuance of a regulation designed to protect the United States and action taken thereunder to withhold the security clearance. Its purpose was not to take property for public use, nor was property taken for public use which is essential to a Fifth Amendment taking.

Since there can be no recovery in this case under any article or amendment of the Constitution of the United States, and absent a contract between plaintiff and the United States, plaintiff's only alternative for recovery, with the exception noted earlier relating to loss of wages, would be under a statute, or a regulation, or for liquidated or unliquidated damages for cases not sounding in tort. 28 U.S.C. § 1491.

No statute or regulation is called to our attention and we know of none which could form the basis of plaintiff's claim. Consequently, plaintiff must also fail on this aspect of the case.

Respecting the portion of the statute which permits suits for liquidated or unliquidated damages for cases not sounding in tort, two decisions of the Court of Appeals for the Third Circuit[2] are significant. The facts of the above cases are very similar to the facts

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[2] *Dupree v. United States*, 247 F. 2d 819; *Dupree v. United States*, 264 F. 2d 140.

in this case, and the court therein clearly recognized and treated the alleged actionable conduct of the defendant as a tort. Recovery was denied because the Federal Tort Claims Act specifically precludes recovery for this particular category of torts. We can see no distinction between the two above cited cases and the case at bar. If it was a tort in the case of Dupree, it is a tort in the instant case, and since the statute specifically exludes tort claims from our jurisdiction, plaintiff cannot recover under this court's general jurisdictional act, *supra*.

This brings us to plaintiff's claim for wages lost by reason of the withholding of his security clearance. Paragraph 26, Industrial Personnel Security Review Regulation, Department of Defense Directive 5220.6, dated February 2, 1955, as amended, authorized the secretary of the department concerned to settle reimbursement claims in appropriate cases resulting from the suspension of a contractor employee's clearance.

As noted earlier, plaintiff's security clearance was restored September 21, 1955. Pursuant to this court's order, plaintiff pursued his administrative remedy and the Secretary of the Air Force approved the claim in the amount of $4,677.52, covering the period July 12, 1954 to January 29, 1955, less outside earnings. He did not grant the claim for the balance of the period January 30, 1955 to September 21, 1955, because plaintiff failed to furnish satisfactory evidence to reasonably demonstrate a deligent interest in securing

employment and availability therefor. It was pointed out to plaintiff in the letter allowing his claim in part that he drew unemployment compensation benefits from the State of California up to January 29, 1955, but they were terminated on that date, presumably because he failed to qualify for them under the unemployment code of that state, and that he did not contest or otherwise dispute such action. This was the only evidence concerning plaintiff's efforts to obtain employment during this period.

At the time of oral argument plaintiff was granted the opportunity to file an affidavit concerning his efforts to obtain employment and he thereafter did file such an affidavit. In his affidavit he avers that while he is now unable to state with precision the particular times, he did make efforts to secure employment and he lists the names of certain organizations to which he applied. He also avers that his efforts were to no avail. He also avers that menial employment, such as dishwashing as suggested by the Department of Employment of the State of California, was not sought, and that he was always ready, willing and able to work after July 12, 1954.

We are of the opinion that a person with the scientific background of plaintiff should not be forced to take jobs so far below his level of intelligence and level of his former employment in order to avoid the implication of failure to seek employment. We are further of the opinion that in consequence of his affidavit, a

question of fact now exists which cannot be disposed of except by a trial before a commissioner of this court.

Consequently, we now remand the case to a commissioner for a determination of the unresolved question of whether or not plaintiff actually did attempt to obtain employment in the period January 30, 1955 to September 21, 1955.[3]

On all other phases of the case, defendant's motion for summary judgment is granted, and plaintiff's petition with respect thereto is dismissed.

[3]If plaintiff prevails, he, of course, would be entitled to recover loss of wages for this period in addition to the administrative determination of $4,677.52.

APPENDIX "B".

Constitutional Provisions, Statute and Provisions of Regulations Involved.

Due Process Clause of Fifth Amendment

nor shall any person

"be deprived of life, liberty, or property, without due process of law;"

Just Compensation Clause of Fifth Amendment

"nor shall private property be taken for public use, without just compensation".

Portion of 82 U.S.C.§491 pertinent in the instant case

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Purported Monetary Restitution Provisions of Regulations Held Unauthorized in Greene v. McElroy, 360 U.S. 474:

"Industrial Personnel and Security Clearance Program" (referred to as Program "A" in this Petition for Writ of Certiorari.)

"23. *Monetary Restitution:* In cases where a final determination is favorable to a contractor-employee (but not a contractor), the Appeal Division will instruct the Executive Secretary to recommend to the Department whose agency origi-

nally referred the case that the contractor-employee be reimbursed for any loss of earnings resulting directly from the denial or revocation of clearance during the interim in an amount not to exceed the difference between the amount he would have earned at the rate he was receiving upon the date of the initial denial or revocation of clearance and the amount of his interim net earnings."

"Industrial Personnel Security Review Regulation (Department of Defense Directive No. 5220.6) referred to as Program "B" in this Petition for Writ of Certiorari.)

"26. *Monetary Restitution:* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation."

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 280

IRVING A. KANAREK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Court of Claims's opinion (Pet. App. A. 1–8) [1] is reported at 314 F. 2d 802.

JURISDICTION

The order of the Court of Claims was entered on March 6, 1963. Petitioner's timely motion for rehearing was denied on April 17, 1964. The petition for a writ of certiorari was filed on July 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

[1] "Pet. App." refers to the appendix to the petition for certiorari.

743-370—64

QUESTION PRESENTED

A contractor's employee was allowed compensation for the erroneous revocation of his security clearance under Department of Defense regulations. The question presented is whether the Court of Claims correctly refused to award additional compensation.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. 1491 provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Paragraph 26 of Department of Defense Directive No. 5220.6, 20 Fed. Reg. 1553, 1559, dated February 2, 1955 provides:

> *Monetary restitution:* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated

for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation.

STATEMENT

Petitioner brought this action in the Court of Claims to recover for damages allegedly resulting when his employment with a government contractor was terminated as the result of an erroneous revocation of his security clearance.

Petitioner was employed as a research engineer with North American Aviation, Inc., when on July 12, 1954, a Department of Defense screening agency (Western Industrial Personnel Security Board) determined that his access to classified materials was "not clearly consistent with the interests of national security." Petitioner was thereafter suspended without pay. Revocation of petitioner's clearance was affirmed by the Security Board's appeal division on September 29, 1954. Nearly a year later, however, the Industrial Personnel Security Review Board reversed this ruling and declared that it was "clearly consistent with the interests of national security" to allow petitioner access to classified information (Deft.'s Exhibit 21). The Review Board authorized the responsible military commander to reissue petitioner's clearance (Deft.'s Exhibit 22). North American Aviation was informed that petitioner's eligibility for clearance had been restored, and petitioner received notice of this fact on September 21, 1955 (Deft.'s Exhibit 23).

Petitioner was unemployed when his eligibility for clearance was restored. Since a security clearance is limited to the contract facility at which the employee is working at the time that it is issued, petitioner was therefore not immediately granted a new clearance for classified materia'. On April 9, 1956, petitioner was hired by Lockheed Aircraft Corporation to perform work relating to rocket propulsion at its facility in Van Nuys, California. On January 21, 1957, while Lockheed's request for a secret clearance was being processed (Deft.'s Exhibit 18), petitioner voluntarily left this job. On April 1, 1957, petitioner was hired by Radioplane Company. Radioplane requested a secret clearance for petitioner, which was issued on February 7, 1958.

On December 29, 1955, petitioner filed an administrative claim pursuant to Department of Defense Directive 5220.6 of February 2, 1955, 20 Fed. Reg. 1553, 1559, asking $9,698.89 compensation for loss of wages between July 12, 1954, and September 21, 1955 (Deft.'s Exhibits 6 and 17).[2] On April 1, 1958, before this administrative claim had been determined, petitioner brought the present action in the Court of Claims. He claimed that, in addition to the sum asked in his administrative claim, he was entitled to damages (1) for loss of wages allegedly suffered between the time when he received notice of his eligibility for a secret clearance (September 21, 1955) and

[2] Processing of petitioner's administrative claim was delayed by the difficulty of obtaining information regarding his efforts to find other employment after North American Aviation suspended him (see Deft.'s Exhibit 17).

the time when he was actually reissued a secret clearance (February 7, 1958) and (2) for loss of professional opportunities which he attributed to revocation of his clearance.[3] These additional claims were made under the Fifth Amendment and the Tucker Act.[4]

On June 30, 1961, the Court of Claims ordered that proceedings before it be suspended until petitioner exhausted the administrative remedy available under Department of Defense Directive 5220.6. On April 19, 1962, the Department of the Air Force informed petitioner that he was entitled to $4,677.52[5] for wages

[3] Petitioner claimed $5,363 for wages lost between September 21, 1955, and April 9, 1956; $8,400 for merit and general wage increases lost between revocation of his clearance and filing of suit; $17,500 for time and experience lost in the field of rocket propulsion research between revocation and reissuance of his secret clearance; and $122,600 for loss of "the capacity to reach levels of financial recompense in both scientific and non-scientific activity consistent with his unique and highly specialized training, abilities, and experience" which he attributed to loss of clearance between July 12, 1954, and February 7, 1958 (Pet. in Ct. Cl.).

In addition, petitioner asked recovery for loss of $250 bonuses customarily awarded by North American Aviation, Inc., to employees whose inventions are patented by the company while they are on the payroll (Pet. in Ct. Cl). One of petitioner's inventions was patented by North American on August 28, 1956. Another was patented on March 29, 1960 (Pet. 7). He alleged that several others will be patented once secrecy orders placed on them are lifted (Pet. 6–7).

[4] By subsequent amendment, petitioner specified that his suit rested on Department of Defense Directive 5220.6, Article II of the Constitution, and both the "due process" and "just compensation" clauses of the Fifth Amendment to the Constitution.

[5] This amount was equal to petitioner's daily salary at the time he was suspended, $32.776, multiplied by 145 working days, minus petitioner's outside earnings of $75.

lost between July 12, 1954, the date on which North American terminated his employment, and January 29, 1955, the date on which the California State Department of Employment declared petitioner ineligible for continued unemployment benefits (Deft.'s Exhibit 32). On May 17, 1962, petitioner rejected the administrative award (Deft.'s Exhibit 33), and on August 3, 1962, proceedings were reinstated in the Court of Claims.

The Court of Claims held that a question of fact existed regarding whether petitioner had diligently sought employment between January 29, 1955, the date on which California had declared petitioner ineligible for unemployment benefits, and September 21, 1955, the end of the period covered by petitioner's administrative claim. It remanded this aspect of the case to a Commissioner for trial on that issue. The court granted the Government's motion for summary judgment as to petitioner's remaining claims, finding neither statutory nor constitutional basis for the relief sought.

ARGUMENT

1. Petitioner's contention that no valid administrative remedy was available to him rests upon an inaccurate reading of this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474. The effect of *Greene* v. *McElroy* was not, as petitioner asserts, to hold Department of Defense Directive 5220.6 entirely invalid, but merely to reject that portion of the Directive providing for revocation of a contractor employee's security clearance without allowing him the right to

cross-examine witnesses upon whose testimony the revocation was based. The reimbursement provisions of the Directive were not affected. Indeed in *Greene* v. *United States*, 376 U.S. 149, the employee involved in *Greene* v. *McElroy* was held affirmatively entitled to restitution under Directive 5220.6. See also *Taylor* v. *McElroy*, 360 U.S. 709.

2. Petitioner has been tendered all of the compensation to which Directive 5220.6 entitles him (subject to possible augmentation upon the determination of a factual issue upon remand). The Directive provides that the contractor employee be reimbursed

> * * * in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. * * *

By the plain words of the Directive, petitioner was entitled only to his wages "at the rate he was receiving on the date of suspension," and not, as he contends, to increases or benefits he might have gained had his clearance not been suspended.[6] Nor can peti-

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[6] The measure of recovery basing compensation upon the wage received on the date of suspension was borrowed from that authorized by the Lloyd-Lafollette Act for government employees erroneously suspended or separated from service, 37 Stat. 555, as amended by 62 Stat. 354, 5 U.S.C. 652. See Hearings before the Subcommittee of the House Committee on Appropriations, on Department of Defense Appropriations for 1956, 84th Cong., 1st Sess., 774–781 (1955). Under this statute and another designed to compensate government employees whose service was errone-

tioner now claim compensation under the Directive for alleged losses after September 21, 1955, since he has made no administrative claim for losses beyond that date.

3. Having recovered his lost wages under Directive 5220.6, petitioner claims additional compensation totaling more than $100,000 for lost bonuses and wage increases, loss of experience in the field of rocket propulsion research, and general loss of employment opportunities allegedly resulting from the suspension of his clearance. These speculative claims—alleged to arise under the due process and just compensation clauses of the Constitution—are insubstantial. In the first place, the consequential loss of petitioner's employment was not a compensable "taking" under the Fifth Amendment. *Omnia Co.* v. *United States*, 261 U.S. 502, 508, 510; *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 236; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155. Secondly, even if the procedures by which petitioner's clearance was revoked constituted a deprivation of property without due process—an issue which has not been resolved in petitioner's favor (see *Greene* v. *McElroy*, 360 U.S. 474, 508;

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ously terminated for security reasons, Act of Aug. 26, 1950, 64 Stat. 476, as amended by 72 Stat. 432, 5 U.S.C. 22-1, no compensation is awarded for raises, *Schaller* v. *United States*, 311 F. 2d 796 (Ct. Cl.); *O'Brien* v. *United States*, 151 F. Supp. 282 (Ct. Cl.); *Leverette* v. *United States*, 142 F. Supp. 955 (Ct. Cl.), or annual leave, *Schaller* v. *United States*, *supra*; *Habicht* v. *United States*, 303 F. 2d 946 (Ct. Cl.); *Zeiger* v. *United States*, 295 F. 2d 915 (Ct. Cl), which an employee would have been entitled to had his employment continued uninterrupted, or for damages consequential to termination of his employment, *Leverette* v. *United States*, *supra*.

Cafeteria & Restaurant Workers Union v. *McElroy*, 367 U.S. 886; *Bailey* v. *Richardson*, 341 U.S. 918, affirming by an equally divided court, 182 F. 2d 46 (C.A.D.C.))—no suit for damages against the United States would lie as a consequence of such unauthorized administrative action. *Schillinger* v. *United States*, 165 U.S. 163, 168; *Hooe* v. *United States*, 218 U.S. 322; *Basso* v. *United States*, 239 U.S. 602; *United States* v. *North American Co.*, 253 U.S. 330, 333; *Mitchell* v. *United States*, 267 U.S. 341, 345; *United States* v. *Goltra*, 312 U.S. 203, 208; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 585; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 166 fn. 12; see 70 Harv. L. Rev. 875–887.[7]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1964.

[7] The petition does not contest the Court of Claims' rejection of petitioner's claims under 28 U.S.C. 1491 as a third-party beneficiary to the government's security agreement with North American Aviation, or for liquidated damages not sounding in tort.

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October Term, 1964
No. 369

IRVING A. KANARECK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Claims.

PETITIONER'S REPLY BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1964
No. 280

IRVING A. KANAREK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Claims.

PETITIONER'S REPLY BRIEF.

Scrutiny of Respondent's Brief in Opposition (hereinafter referred to as "Brief Opp.") fortifies the Petition for the Writ of Certiorari:

I.

Respondent Concedes That the Secret Clearance Was Not Re-Granted Until February 7, 1958.

Respondent concedes (Brief Opp. 4) that secret clearance was regranted on February 7, 1958. Petitioner has shown this in his Petition (Pet. 10) and before the United States Court of Claims. In the decision and judgment of the Court of Claims (see Appendix "A" at the bottom of p. 2 of Appendices in Petition) that Court incorrectly finds and holds that on September 21, 1955, access to classified security information was

restored; said Court of Claims has refused to consider Petitioner's claim beyond said September 21, 1955. Respondent states (Brief Opp. 4) that on September 21, 1955, Petitioner received notice of his eligibility for a secret clearance. Such simply was not the case. On September 16, 1955, Petitioner was merely sent notice [Ex. 23] that his access to classified information was "clearly consistent with the interests of national security." There was no statement made as to the degree of classification for which he was eligible: confidential, secret, or top secret. Despite the fact that respondent found on or about September 16, 1955 that the granting of access to classified information to Petitioner was "clearly consistent with the interests of national security", Petitioner was not able to obtain employment until April 9, 1956, (at Lockheed Aircraft Corporation); and even after obtraining employment at said Lockheed Aircraft Corporation, respondent did not allow Petitioner access to classified information at the secret level, necessarily handicapping Petitioner in his professional work at Lockheed. On the date of severance from Lockheed on January 21, 1957, the United States still, despite the lip service given on September 16, 1955, that the granting of access of Petitioner to classified material was "clearly consistent with the interests of national security," had not granted Petitioner secret clearance, let alone the top secret clearance which he had had at North American Aviation. In any event, *Taylor v. McElroy*, 360 U. S. 709, (Brief Opp. 7), clearly holds that the compensation for wages lost must be the

> "wages lost during the time he (referring to Mr. Taylor at p. 711) was unemployed due to clearance revocation."

Thus on this point alone the Court below, in allowing no monetary recovery beyond September 21, 1955, has clearly not followed the holding of this Court in the *Taylor* case since petitioner did not regain employment until April 9, 1956, and did not regain secret clearance until February 7, 1958.

II.

Petitioner's Claim Below Extended Beyond September 21, 1955.

The statement by respondent (Brief Opp. top of p. 8) that Petitioner has made no administrative claim for losses beyond September 21, 1955 is simply not the case. This is evident by referring to the Certified Record [R. 133-139] "Defendant's Supplemental Brief and Exhibits Following Administrative Action." The Exhibits attached to and described in said Supplemental Brief plainly show Petitioner's claim for at least $163,831 [See Exs. 25, 27, 29, 30, 32, and 33].

III.

The Petition Requests That This Court Consider All of the Grounds Under 28 U. S. C 1491.

Respondent erroneously states (Brief Opp. footnote at p. 9) that Petitioner does not contest the rejection by the Court of Claims of Petitioner's claim under the two portions of 28 U. S. C. 1491 referred to in footnote 7 (Brief Opp. p. 9). At page 11 of the Petition it may be clearly seen that Petitioner is basing his Petition on all of the clauses of 28 U. S. C. 1491 (See App. "B", p. 9 of Appendices of the Petition wherein there is set forth the portion of 28 U. S. C. 1491 pertinent in the instant case). See the Certified Record [R. 1160 and R. 95-122] wherein there is set forth in great detail the basis for recovery under each of the

portions of 28 U. S. C. 1491; for instance, the basis that the claim is one for liquidated or unliquidated damages in a case not sounding in tort is analyzed in Section IV [beginning at R. 104] of "Plaintiff's Response Brief to Defendant's Reply to Plaintiff's Objections to Defendant's Motion to Dismiss" [which begins at R. 95].

Analysis of Sections 106, 107 of Prosser, Law of Torts (2d Ed. 1955) leaves no doubt whatsoever that a very essential element of the tort of interference with contractual relations is that said interference be INTENTIONAL, if not actually malicious or based on fraud. The relationship between the Plaintiff and North American Aviation, Inc. on the date that security clearance was withdrawn, July 12, 1954, was that of an employment contract terminable at the will of either party. In the interference of such contracts, Prosser indicates, California finds no tort even when the third party does act willfully, maliciously and fraudulently and with intent to damage the Plaintiff. *G. E. Harris v. Edward Hirschfeld et al.*, 13 Cal. App. 2d 204 at 205. The *Harris* case is cited in Section 106 at page 720, note 52 of Prosser. In the *Harris* case the Court had before it a contract at will in the form of a partnership. In *Gruen Watch Company v. Artist Alliance, Inc. et al*, 191 F. 2d 700, the Court of Appeals for the Ninth Circuit, which includes California, in construing California law, decided that whether a contract is at the will of the parties or not, a tort does arise in a situation in which the actor conducts himself in a manner wherein he DELIBERATELY interferes with the contractual relations between the plaintiff and a third party. In the *Gruen* case the acts

giving rise to the tort were designed with the specific intent of interfering with the plaintiff's contractual relations with the third party. In *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33 at 39 the California Supreme Court states

> "In California, therefore, an action will lie for unjustifiably INDUCING a breach of contract." (Emphasis added.)

The Court in *Imperial Ice* stated, *inter alia*, for a tort action to lie in California the act of inducing the breach must have been done with the specific purpose in mind of bringing about said breach. Surely the respondent does not contend that security clearance was withdrawn for the specific purpose of interfering with the instant Petitioner's employment. Supposely, said withdrawal was to protect security. In fact, in Item 3c of Program A, at page 2 of the Industrial Personnel and Facility Security Clearance Program and Item 3b of Program B, at page 2 of the Industrial Personnel Security Review Regulation it is set-forth that the purposes of Program A and Program B do not encompass the intent of precluding one whose security clearance is withdrawn from participating in unclassified work for the same employer for whom he worked while having security clearance.

Applying, then, 28 U. S. C. 1346 (b) to the instant case no tort of interference with contractual relations occurred. Such must be the conclusion since 28 U. S. C. 1346 (b) very clearly states that the law to be applied is "the law of the place where the act or omission occurred." Since the withdrawal of security clearance occurred in California, there was no tort, as aforesaid. This Court is referred to the analysis of interference

with contract relationships in 28 Cal. Jur. 2d 423 *et seq.* Just a few of the cases in point are *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, *Imperial Ice Company v. Rossier*, 18 Cal. 2d 33, cited *supra*, and *Patterson Glass Company v. Thomas*, 41 Cal. App. 559. Pervading all California case law on the subject is the requirement that there be SPECIFIC INTENT TO INDUCE THE BREACH BETWEEN THE PLAINTIFF AND THE THIRD PARTY ON THE PART OF THE ACTOR. Certainly, as aforesaid, the respondent does not impute such motivation to its representatives in the instant case.

In Section 107 of Prosser, alluded to previously, Professor Prosser shows clearly that in interference with prospective advantage, as he terms it, there is the requirement of a greater degree of intent on the part of a defendant before such interference becomes a tort than in the situation involving an existing contract. A fortiori, stronger specific intent is necessary for a tort to exist in the prospective advantage or prospective contract situation since in the "prospective" cases there is no privity on the part of the plaintiff and a third party or third parties contemporaneous with the actor's wrongful acts. Cases in point are *Masoni v. Board of Trade*, 119 Cal. App. 2d 738 and *Krigbaum v. Sharbaro*, 23 Cal. App. 427 cited at 28 Cal. Jur. 2d 427. Here, again, California law is applicable, and thus, if the actor had been a private person committing these acts in California, said acts would not have resulted in a tort. Thus, the acts here do not fall within the scope of 28 U. S. C. 1346 (b).

Hence, the acts of the defendant constitute a case "not sounding in tort" and not within the Federal Tort

Claims Act. That such is the case is fortified by 28 U. S. C. 2680 (h) which does not even encompass interference with prospective economic advantages within its scope. See *Builders Corporation of America v. United States*, 259 F. 2d 766 at 769. Plaintiff's claim is one "not sounding in tort" and within the jurisdiction of the Court of Claims.

IV.

There Is No Administrative Remedy.

Petitioner contends there was, in fact, no administrative remedy (Pet. 9; [R. 118-122] to exhaust. A procedure whereby, as in the instant case, the so-called "administrative remedy" consisted of correspondence between a citizen and the Federal Government in which there is no set individual or office of the Federal Government delegated with specific authority to administer the claim involved, but rather, there is an unorganized, unprescribed passing of a file from one office to another, and from one person to another, with no prescribed time for resolution of a claim, or even a time prescribed when the alleged administrative remedy reaches its conclusion, hardly constitutes a procedure which may be given the dignity of being termed an "administrative remedy." Furthermore, the personnel purportedly administering the claim in the instant case are personnel of the same department which promulgated the regulation which this Court found to be unauthorized; it is respectfully suggested that the alacrity and objectivity with which this claim has been administered was diluted down, to say the least, by the resentment of the fact that this Court found Programs "A" and "B" unauthorized.

V.

Purported Monetary Restitution Provisions Are Unauthorized.

Respondent states (Brief Opp. 7) that the reimbursement provisions of the Department of Defense Directive 5220.6 were not affected by *Greene v. McElroy*, 360 U. S. 474. Petitioner contends that said reimbursement provisions are, in fact, unauthorized (Pet. 2). In *Greene v. United States*, 376 U. S. 149, the parties did not raise or dispute the specific question of whether or not the monetary restitution provisions were authorized; nor was it raised or disputed in *Greene v. McElroy, supra*, or in *Taylor v. McElroy*, 360 U. S. 709 where the ultimate relief sought was security clearance not money damages. Petitioner contends that what was termed Program "A" and Program "B" in the Petition were unauthorized. Such must be the conclusion since the Federal Constitution delegates certain powers to the executive branch none of which gives to any office of said executive branch the power to legislate law applicable to claims arising from the unauthorized withdrawal of security clearance of an employee of a contractor of the Federal Government.

In what Petitioner contends is a vain attempt to find authority for the monetary restitution provisions (Brief Opp. 7, footnote 6), respondent cites Federal law which applies to Government employees, tacitly admitting that there is no authority to determine the provisions for setting monetary damages in the case of Petitioner, an employee of a contractor of the Federal Government. In this connection, it is extremely important to note that the Federal statutes and cases cited in the aforementioned footnote 6 (Brief Opp. bottom p. 7 and

bottom p. 8) clearly apply only to employees of the Federal Government (see 5 U. S. C. 22-1 and 5 U. S. C. 652). In Cooley's "A Treatise on the Constitutional Limitations" (Eighth Edition, 1927) it is stated at p. 224 as follows:

> "One of the settled maxims in constitutional law is, that the power conveyed upon the legislature to make laws cannot be delegated by that department to any other body or authority".

Furthermore, in *Field v. Clark*, 143 U. S. 649, this Court held at p. 692

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and the maintenance of the system of government ordained by the Constitution."

In the instant case the purported monetary damage provisions are invalid, *a fortiori*, since not only is there no delegation to the President or any executive department by Congress for the formulation of regulations for the expenditure of Federal funds for monetary damages to a contractor-employee due to the unauthorized withdrawal of security clearance, but the President himself made no order authorizing any Federal agency to formulate purported monetary restitution provisions which respondent is attempting to apply here. Rather someone arbitrarily "borrowed" a statute (Brief Opp. 9, footnote 6). The danger in allowing legislative power to repose in those to whom such power has not been delegated by the Constitution is evident in Defendant's Exhibit 9 in the Certified Record (attached to Defendant's Reply to Plaintiff's Objections to Defendant's

Motion to Dismiss which begins at R. 63). In said exhibit, a letter of July 18, 1950, Respondent stated that the monetary restitution requested by Petitioner was GRATUITOUS, clearly showing that the state of mind of the agency of the Federal Government involved was that the claim was being processed at its whim and caprice and not as a claim justified in law. The statement is as follows [see last two sentences of the second paragraph of said Ex. 9]:

> "Please be further advised that there is no statute or law which creates liability for such repayment on the part of the United States. Claims of your type are considered GRATUITOUS payments under the regulations set within the Department of Defense" (Emphasis added).

This approach to the administration of a claim involving Federal funds hardly represents the judicial approach demanded by this Court in the administration of justice at any level in the administrative or judicial process.

VI.

Petitioner's Claim Has Adequate Bases Founded on the Due Process and Just Compensation Clauses of the Fifth Amendment.

Plaintiff's Objections to Defendant's Motion to Dismiss before the Court of Claims [beginning at R. 11] sets forth due process and just compensation bases for Petitioner's claim [See Sec. V of said Objections beginning at R. 19, Sec. VII of said Objections beginning at R. 25 and Sec. VIII of said Objections beginning at R. 32]. Respondent's reliance upon the *Omnia Co.*, *Grand River Dam* and *Central Eureka Mining* cases (Brief Opp. 8) is misplaced since in each of those cases

there was a lawful exercise of delegated power by the Federal Government. In the instant case, of course, since the withdrawal of security clearance was not authorized, there was no lawful exercise of a delegated power by the Federal Government. Respondent states (Brief Opp. bottom of p. 8) that the issue of whether or not the revocation of Petitioner's security clearance constitutes a deprivation of property without due process of law has not been resolved in Petitioner's favor, notwithstanding the fact that in the *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U. S. 886 at 898, this Court very strongly indicates that bestowing a "badge of disloyalty and infamy" constitutes such deprivation.

Respondent's contention (Brief Opp. p. 9) that no suit for damages lies against the United States as a consequence of unauthorized administrative action has a crumbling foundation. See *Larson v. Domestic and Foreign Corp.*, 337 U. S. 682. At the bottom of p. 703 and top of p. 704 in *Larson* this Court states that it should "give hospital scope" to suits for damages, stating that there "may be substance" in connection with such suits for the viewpoint that the

> "principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible."

Furthermore, in the instant case under 28 U. S. C. 1491 Congress has provided for suits founded upon the Constitution which is one of the bases for the claim for damages in the instant case (see, *infra*).

Justice Clark in his dissent in *Greene v. McElroy, supra*, at 513 points out that the decision of the Court in *Greene*

"may have the effect of by-passing"

the Tort Claims Act exemption of the Government from suit for interference with private contracts. Justice Clark states on page 512 that the Court held that *Greene* is protected by the Fifth Amendment. He makes the same statement on page 513.

In *Compagnie General Transatlantique v. The United States*, 21 Fed. 2d 465, Judge Augustus Hand states at p. 466, referring to the Tucker Act, which is now essentially 28 U. S. C. 1491:

> "To limit the recovery in cases 'founded' upon a law of Congress to cases where the law provides in terms for a recovery would make that provision of the Tucker Act almost entirely unavailable, because it would allow recovery only in cases where laws other than the Tucker Act already created a right of recovery. 'Founded' must therefore mean reasonably involving the application of a law of Congress."

By the same token one or more of the four segments or clauses of 28 U. S. C. 1491 may be "reasonably" involved in a particular case. Unquestionably in this case the Constitution by way of the due process and just compensation clauses of the Fifth Amendment is "reasonably" involved.

Significantly, respondent does not dispute the fundamental conflict, pointed out at the bottom of page 14

of the Petition, which exists between the decisions of the Court of Appeals for the Ninth Circuit and the Court of Claims.

Conclusion.

Petitioner asks this Court of last resort to grant a plenary review so that correct evaluation and assessment of the past and continuing damage sustained by Petitioner (to date the damage has extended for over a ten year period) may take place. For the reasons set-forth herein, and in the Petition for a Writ of Certiorari, said Petition should be granted.

Respectfully submitted,

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Counsel for Petitioner.

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Supreme Court of the United States

October Term, 1964

No. 280

IRVING A. KANAREK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Claims.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioner prays that this Court grant rehearing of its order of October 12, 1964, denying the Petition for Writ of Certiorari, 379 U. S. ....., and that a Writ of Certiorari issue to review the judgment of the Court of Claims in the above entitled case as prayed for in both the timely Petition filed July 15, 1964, herein, and in Petitioner's timely Reply Brief.

Reasons for Granting Rehearing and Issuing the Writ.

Only the Court of Claims may function as a trial court in connection with the claim in the instant case. A conflict in decisions between two, or among the several Courts of Appeal as to the EXTENT of damages

and/or CRITERIA for evaluation of damages in a case, such as the instant one, is not possible. The only review possible of a Court of Claims decision is one by this Court. No resort to a Court of Appeals lies. Petitioner's security clearance was not restored on September 21, 1955. He was not able even to return to work until April 9, 1956. Yet, notwithstanding the decisions of this Court, the Court of Claims has arbitrarily set September 21, 1955 as a terminal date for the evaluation of damages.

In *Schriber-Schroth v. Cleveland Trust Company,* (see 305 U. S. 47 at 50), this Court granted a Petition for Rehearing where a conflict of decisions between Courts of Appeal was improbable; *a fortiori,* this Court is exhorted to grant a rehearing in the instant case where conflict on the EXTENT of damage and/or CRITERIA for measuring extent of damage is impossible, not only improbable, since, as aforesaid, only the Court of Claims has power to try the instant case. Calamitous, vicious, and extensive damages have been inflicted upon petitioner, have continued for over ten years, and continue still, as a result of the unauthorized, arbitrary, and capricious withdrawal of security clearance.

The IMPOSSIBILITY of the existence of the above set-forth conflict, pertaining to the EXTENT of damages and/or CRITERIA to be used to evaluate damages constitutes substantial grounds which were available to Petitioner although they were not explicitly presented previously.

Conclusion.

For the reasons set forth above, in the Petition for Writ of Certiorari, and in Petitioner's Reply Brief, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Court of Claims.

Respectfully submitted,

IRVING A. KANAREK,
Counsel for Petitioner.